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Supreme Court
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CHARLES ELMORE

No. 667

In the Supreme Court of the United States

OCTOBER TERM, 1931

ATLANTIC CLEANERS AND DYERS, INC.; GLOBE DRY CLEANERS AND DYERS, ARCADE-SUN-SHINE CO., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	5
Argument:	
A price-fixing agreement by persons engaged in the business of cleaning and dyeing clothes in the District of Columbia is in restraint of trade or commerce within the meaning of the Sherman Act	6
Conclusion	17

CITATIONS

American Bond & Mortgage Co. v. *United States*, 52 F. (2d) 318	7
American Laundry Co. v. *E. & W. Dry-cleaning Co.*, 199 Ala. 154	8
Buckeley v. *Martens*, 156 Atl. 436	9
Campbell v. *Motion Picture Machine Operators' Union*, 151 Minn. 220	12
Federal Baseball Club v. *National League*, 259 U. S. 200	10
General Electric Co. v. *Federal Radio Commission*, 31 F. (2d) 630	7
Hart v. *Keith Vaudeville Exchange*, 12 F. (2d) 341	11
Kansas City v. *Seaman*, 99 Kans. 143	9, 12
Kidd v. *Pearson*, 128 U. S. 1	13
Mitchel v. *Reynolds*, 1 P. Wms. 181	16
Smith v. *Jackson*, 103 Tenn. 673	11, 12
Standard Oil Co. v. *United States*, 221 U. S. 1	7
State of California v. *Tagami*, 195 Cal. 522	10
State v. *Duluth Board of Trade*, 107 Minn. 506	11, 12
State v. *Frank*, 114 Ark. 47	11
State v. *McClellan*, 155 La. 37	11
Swift & Co. v. *United States*, 276 U. S. 311	2
The Case of the Tailors of Ipswich, 11 Coke's Rep. 53a	15
United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271	15
United States v. *American Linseed Oil Co.*, 262 U. S. 371	14
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290	7
United States v. *Union Pacific R. R. Co.*, 226 U. S. 61	13
Western Union Telegraph Co. v. *Pendleton*, 122 U. S. 347	7
Year Book, 2 Hen. V, fol. 5, pl. 26	15
Modern Methods in Drycleaning	6
Act of July 2, 1890, c. 647, 26 Stat. 209, Secs. 3 and 4 (U. S. C., Title 15, Secs. 3 and 4)	2

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OPINION BELOW

The memorandum opinion of the Supreme Court of the District of Columbia (R. 11), entered upon the motion to dismiss the petition, is unreported.

JURISDICTION

The decree of the court below was entered November 5, 1931. (R. 23.) Petition for appeal was filed December 29, 1931, and was allowed January 2, 1932. (R. 25, 26.)

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). *Swift & Co.* v. *United States*, 276 U. S. 311.

QUESTION PRESENTED

Whether a price-fixing agreement by persons engaged in the business of cleaning and dyeing clothes in the District of Columbia is in restraint of trade or commerce within the meaning of the Sherman Act.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Sec. 3 and 4), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, * * * is hereby declared illegal. * * *
>
> SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a suit in equity under Section 4 of the Sherman Antitrust Act to enjoin appellants from further engaging in a combination and conspiracy in restraint of trade and commerce in the District of Columbia in cleaning, dyeing, and otherwise renovating clothes, in violation of Section 3 of that Act. (R. 1, 5.)

The court below overruled motions to dismiss the petition and appellants filed amended answers. (R. 11, 12, 14, 16, 18, 20.) The answers did not deny, and hence admitted (Equity Rule 30), all the material allegations of fact contained in the petition.[1] The sole defense set up was that appellants' business of dry cleaning and dyeing "consists solely of the performance of labor and the rendering of a service in cleaning, dyeing, and/or renovating wearing apparel and other articles which have passed into the hands of the ultimate consumer thereof, and is not trade or commerce within the meaning of" the Sherman Antitrust Act. (R. 13, 15, 17, 19, 21.) Upon motion by the United States, the court ordered these answers stricken from the files upon the ground that they

[1] The petition alleged that defendants together did substantially all of the business of cleaning, dyeing, and renovating clothing in the District of Columbia. (R. 3.) The answers stated, on information and belief, that persons other than the defendants did at least one-half of this business. (R. 13, 15, 17, 19, 21.)

did not state a valid defense. (R. 22, 23.) After appellants had advised the court that they elected to stand upon their answers, a decree was entered enjoining the combination and conspiracy charged in the petition. (R. 23–24.)

Upon the pleadings, the following facts stand admitted. Appellants are engaged in the business of cleaning, dyeing, and otherwise renovating clothing at plants located in the District of Columbia. (R. 2–3.) Their business is in part, and in some cases principally, at wholesale, pursuant to contracts or engagements with so-called retail dyers and cleaners who maintain shops in the District and receive from the public clothing to be cleaned, dyed, or otherwise renovated. (R. 3, 13–21.) In August, 1928, appellants agreed to raise the prices then being charged for cleaning, dyeing, and otherwise renovating clothing and agreed upon certain minimum and uniform prices, terms, and conditions as those which they would thereafter charge for performing such service. (R. 3.) They also agreed to assign and allot the retail dyers and cleaners among themselves, and each agreed to trade only with the retailers assigned to him. (R. 4.) Appellants subsequently put into effect and carried out their agreement to maintain minimum and uniform prices and to allot customers. (R. 4.)

SUMMARY OF ARGUMENT

Appellants are carrying on the business of cleaning and dyeing clothes for the purpose of making a profit from the sale of a standardized, nonpersonal service. Their business is "trade or commerce" within the meaning of the Sherman Act even if those words are used in the limited sense of barter and exchange. Appellants barter the standardized service which they perform for what it will bring from those desiring the service. The exchange of a given unit of service for a price has been held to be trade or commerce. Transportation is the rendering of a service, and transportation itself is commerce. Transmission of intelligence by telegraph or radio, where a service only is performed, is also commerce. An agreement not to compete in the business of cleaning clothes has been held within the common law doctrine of restraint of trade.

If the meaning of the statute is doubtful, the intention of Congress may be considered. Appellants' agreement to fix prices and allot customers in the cleaning and dyeing business engenders the evils against which the statute was directed and therefore may be presumed to be within the scope of the Act. In addition, the history of the common law doctrine of restraint of trade leads to the same conclusion. Not only was trade which consists in performing a service not outside the common law doctrine, but the doctrine was first applied to protect such trade.

ARGUMENT

A PRICE-FIXING AGREEMENT BY PERSONS ENGAGED IN THE BUSINESS OF CLEANING AND DYEING CLOTHES IN THE DISTRICT OF COLUMBIA IS IN RESTRAINT OF TRADE OR COMMERCE WITHIN THE MEANING OF THE SHERMAN ACT

Appellants contend that the words "trade or commerce," as used in the Sherman Act, do not apply to any business which consists in supplying a service, even though the business has all the earmarks of an ordinary commercial undertaking.

Appellants are engaged in cleaning and dyeing clothes. The service they perform is standardized, as evidenced by their agreement to charge uniform prices. The so-called service performed is also wholly nonpersonal. Appellants are not, like the owner of a baseball club or a theatre, engaged in marketing or exploiting the skill of particular individuals. To the extent that appellants operate at wholesale, the customer whose clothes are serviced may not even know the name of the company which did the work. And the court, we assume, may take judicial notice that appropriate machinery and equipment are used in the business.[2] It is our contention that the business of purveying a standardized, nonpersonal service, where there is, as here, competition upon a price basis, is trade or commerce within the meaning of the Sherman Act.

[2] See "Modern Methods in Dry cleaning," by George G. Gaubatz, jr., published by National Association of Dyers and Cleaners, 1931, pp. 8, 17, 19, 25, 115.

We submit that this view is supported by the decisions, by a consideration of the purposes of the Sherman Act, and by the history of the common-law doctrine of restraint of trade.

Railroads, whose business consists in furnishing a service, the service of transportation, have long been recognized as subject to the limitations of the Sherman Act. This was held in one of the first Sherman Act cases to come before this Court (*United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290), where the Court rejected (p. 312) the contention that the Act was intended to reach only those engaged in the manufacture and sale of articles of commerce, and said, "Railroad companies are instruments of commerce, and their business is commerce itself.".

The business of a telegraph company is furnishing the service communication, but this business has been held to be commerce. *Western Union Telegraph Co.* v. *Pendleton,* 122 U. S. 347. Furnishing a broadcasting service by radio is within the regulatory power of Congress under the commerce clause of the Constitution. *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 322 (C. C. A., 7th), certiorari denied February 23, 1932; *General Electric Co.* v. *Federal Radio Commission,* 31 F. (2d) 630, 633 (Ct. App., D. C.), certiorari dismissed, 281 U. S. 464.

In *Standard Oil Company* v. *United States,* 221 U. S. 1, this Court said (p. 51) that the terms of

the Sherman Act, "at least in their rudimentary meaning, took their origin in the common law" and (p. 60) that the scope of the Act is to be measured by "the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute." It is therefore significant that the common law doctrine of restraint of trade has been applied to the business of dry cleaning as well as to the laundry business.

In *American Laundry Co.* v. *E. & W. Dry-cleaning Co.*, 199 Ala. 154, the plaintiff sued to enjoin violation of a contract entered into between it and five laundry companies. The contract provided that the plaintiff was to establish a dry-cleaning plant in Birmingham, Ala.; that for a period of ten years it would not engage in the laundry business and for the same period the five laundry companies would not engage in the dry-cleaning business; that all dry-cleaning work collected by the laundry companies from their customers should be done by the plaintiff, the laundry companies receiving 25% of the price paid by the customer. The bill alleged that the plaintiff, relying upon this contract, had invested $10,000 in dry-cleaning machinery and equipment and had erected a modern dry-cleaning plant. The defendant laundry company was charged with having refused to deliver to the plaintiff dry-cleaning work collected from the defendant's customers. The court held that the contract, by reason of its tendency to stifle com-

petition, was in restraint of trade and therefore unenforceable in equity.

A recent decision by the New Jersey Court of Errors and Appeals is similar. In *Buckelew* v. *Martens,* 156 Atl. 436, suit was brought on a demand note given to secure payment of liquidated damages for the breach of an agreement between certain laundry companies. The laundry companies agreed to charge their customers a minimum price, to require solicitors of laundry work to charge the same minimum rate, and to employ as solicitors only those with whom they previously dealt. The court affirmed judgment for the defendant upon the ground that the contract was in restraint of trade and illegal at common law. The court said (p. 438):

> The public are entitled to have competition, in order that they may buy at the lowest price, and it makes no difference whether the price-fixing agreements are reasonable or unreasonable or tend to monopoly or not.

Kansas City v. *Seaman,* 99 Kans. 143, held that an employee of a laundry company located in Missouri who collected in Kansas City, Kans., articles to be laundered and who returned the same after they had been laundered was engaged in interstate commerce and therefore not subject to a license fee imposed on every person carrying on the laundry business in Kansas City, Kans. The court rejected (pp. 144–145) the contention made by the city that no

commerce was involved because the transaction was for a personal service with reference to property owned by customers and because the laundry company was selling, not goods, but service. It held that the barter and sale of certain services, like the barter and sale of commodities, may be commerce.

State of California v. *Tagami,* 195 Cal. 522, held that leasing land for the purpose of conducting a sanitarium was within the scope of a treaty guaranteeing to the citizens of each contracting party the right "to carry on trade" and to lease land for "commercial purposes." The court said (pp. 528–529):

> The words "trade" and "commerce" are frequently found in conjunction or juxtaposition in treaties between nations and in those constitutions and laws which define and regulate the scope and purposes of such international engagements. They are also often employed by lexicographers in defining each other. When so employed, and particularly when so used in the conjunctive, they are held to impart to each other an enlarged signification which would include practically every business occupation carried on for the purpose of procuring subsistence or profit and into which, or any material part of which, the elements of bargain and sale, barter, exchange, or traffic enter.

Appellants rely upon *Federal Baseball Club* v. *National League,* 259 U. S. 200, holding that leagues of professional baseball clubs promoting

competitive games between clubs in different States are not subject to the provisions of the Sherman Act. The Court said (pp. 208-209) that the business was giving exhibitions of baseball, which are purely State affairs, and that the interstate transportation attendant upon such exhibitions "is a mere incident, not the essential thing." It said further (p. 209):

> That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce.

Each member of a baseball team is employed because of his individual, personal skill. There is no sale of a standardized service, but rather a hiring of the peculiar skill and ability of particular individuals. The service contracted for is purely personal and hence not a subject of commerce. The case is like *Hart* v. *Keith Vaudeville Exchange*, 12 F. (2d) 341 (C. C. A. 2d), certiorari denied 273 U. S. 703, which held that a combination to monopolize the giving of vaudeville exhibitions was not a violation of the Sherman Act.

Appellants also rely upon *State* v. *Frank*, 114 Ark. 47; *State* v. *McClellan*, 155 La. 37; *Smith* v. *Jackson*, 103 Tenn. 673; and *State* v. *Duluth Board of Trade*, 107 Minn. 506. The first two cases held that the respective State antitrust acts did not apply to the laundry business. In *State* v. *Frank*,

supra, the law merely prohibited fixing the price of any "commodity." In *State* v. *McClellan*, *supra*, the section of the act upon which the indictment was based prohibited attempts to monopolize "trade or commerce," but the court held (p. 43) that it was necessary to turn to another section of the act for a definition of these words and that, so construed, only those who sold, leased, or dealt in commodities were within the act.

Smith v. *Jackson*, *supra*, held that the Commerce Clause of the Federal Constitution did not bar a Tennessee occupational tax upon a resident of that State acting as agent for a Kentucky laundry in the collection and delivery of clothes. The decision is in direct conflict with *Kansas City* v. *Seaman*, 99 Kan. 143, *supra*.

State v. *Duluth Board of Trade*, *supra*, held that the rule of a grain exchange requiring its members to charge uniform commissions did not violate the State antitrust law. The court (pp. 546, 551) regarded the commission men as competing with each other on the basis of individual skill and therefore performing a personal service. The court also held (pp. 550–551) that the rule under attack did not restrain trade, because it promoted, rather than stifled, competition. The case was qualified in *Campbell* v. *Motion Picture Machine Operators' Union*, 151 Minn. 220, 230–231, where the court adopted the broad view that the exchange of personal service for a money consideration is "trade" within the meaning of the State antitrust law. In

that case the court, referring to the contention that the business of exhibiting motion pictures is not trade, said (p. 232):

> It seems clear to us that the only logical conclusion is that the word has been used in its broadest sense and includes business of any kind in which a person engages for profit.

Appellants also rely upon cases holding that manufacturing is not commerce. But appellants are not manufacturers; as this Court said in *Kidd* v. *Pearson,* 128 U. S. 1, 20, "Manufacture is transformation—the fashioning of raw materials into a change of form for use." The question here is whether the provisions of the Sherman Act declaring unlawful every agreement in restraint of trade and commerce within the District of Columbia apply to a business where a standardized service is exchanged for cash or whether these provisions apply only to those engaged in the sale or exchange of commodities.

If there is doubt as to the meaning of the statute, it is proper to consider the intention of Congress. Referring to the Sherman Act, the Court said, in *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 87:

> To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

In *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 388, the Court said:

> The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.

Under the circumstances here presented there may be competition among those engaged in the business of selling a service or there may be, by reason of an agreement fixing prices and allotting customers, suppression of all competition. A statute enacted to protect against "evils commonly incident to monopolies" will fail of its full purpose if such a business is beyond the reach of the statute. The consequences of an agreement to maintain prices in such trade may be as serious as those of an agreement to fix the price of a commodity. The price paid for cleaning clothes may be of as much concern to the public as the price of an article of food or clothing. Appellants' agreement restrains the trade of retail shops which receive clothes from the public and have them cleaned or dyed by wholesalers in the same way that a price agreement among wholesalers of shoes would restrain the trade of retail shoe stores.

Not only does consideration of the purposes of the Sherman Act lead to the conclusion that it

applies to appellants' business, but the history of the common-law doctrine of restraint of trade leads to the same conclusion.

The contract in restraint of trade which originally fell under the condemnation of the common law was one whereby a party bound himself not to follow some particular occupation, trade, or calling. From early times it was the policy of the English law to discourage such restraints. They were condemned because they tended to deprive the community of the services of one of its members and frequently tended to create a monopoly and thus destroy the freedom of trade. See *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 279.

The law of restraint of trade thus grew up to protect the trade of the handicraftsman, who performs a service. Curiously, the earliest recorded case (1415) of restraint of trade is that of a dyer. The defendant had bound himself not to exercise his art in the same town as the plaintiff. Justice Hull, after holding the contract void, indignantly exclaimed, "*per Dieu,* if plaintiff were here, he should go to prison until he paid a fine to the King." Year Book, 2 Hen. V, fol. 5, pl. 26.

The Case of the Tailors of Ipswich, 11 Coke's Rep. 53a, was an action of debt against a tailor for exercising his trade without having complied with an ordinance of the corporation of the tailors of Ipswich which prohibited any one from exercising that trade in the town of Ipswich until he had

served at least seven years as an apprentice and had been admitted by them to be a sufficient workman. It was argued—

> That at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium vitiorum mater,* and especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade; * * *

The court gave judgment for the defendant, holding that at common law no man could be prohibited from working at any lawful trade.

The early doctrine that all restraints were bad, without exception, gave way (1717) to the view that partial restraints, reasonably adapted to serve the interests of the contracting parties and not injurious to the public, were valid. *Mitchel* v. *Reynolds,* 1 P. Wms. 181. But it was never suggested that the doctrine of restraint of trade did not apply where the trade was carrying on, furnishing, or performing a service.

In prohibiting agreements in restraint of trade or commerce among the States, Congres necessarily acted within the limits of its regulatory power over interstate commerce. In legislating

for the District of Columbia, Congress was not subject to this limitation, and it may have intended to embrace the whole domain of the common law. But for the purposes of the present case it is not necessary to adopt this construction.

Appellants' agreement to fix the prices to be charged for the service of cleaning or dyeing clothes is within the purposes of the Sherman Act because it engenders the evils against which the statute was directed. From the standpoint of legal history, restraint of trade includes a business which consists in performing a service, and Congress adopted the terminology of the common law. It would be a strange reversal, after five centuries, to hold that the business of dyeing, which called forth the first announcement of the doctrine of restraint of trade, is not within a statute the terms of which "at least in their rudimentary meaning, took their origin in the common law."

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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